

1982 appellant underwent a left L4 hemilaminectomy and discectomy. He stopped work on October 27, 1982 and returned on January 5, 1983.

Appellant continued to receive medical treatment for his back pain. In a September 13, 2004 radiology report, Dr. James W. Limbaugh, a Board-certified radiologist, observed that appellant's intervertebral disc spaces at L4-5 and L5-S1 were narrowed with vacuum disc phenomenon, but he did not find any evidence of spondylolysis or spondylolisthesis. He diagnosed degenerative disc disease L4-5 and L5-S1.

In an October 1, 2004 magnetic resonance imaging (MRI) scan report, Dr. Stephen H. Percelay, a Board-certified radiologist, noted appellant's medical history of low back and bilateral lower extremity pain and 1982 back surgery. He observed normally aligned and normal height vertebral bodies with degenerative marrow signal changes involving appellant's L4-5 and L5-S1 disc spaces. Dr. Percelay further noted disc space narrowing and desiccation at L5-S1 with left-sided disc bulging and osteophytic complex, mild-to-moderate bilateral neural foraminal narrowing at that level and desiccation and narrowing of the L4-5 disc with mild diffuse disc bulging.

In a September 16, 2005 MRI scan report, Dr. Daniel L. Starnes, a Board-certified diagnostic radiologist, noted appellant's complaints of low back and left leg pain. He diagnosed prominent central and broad-based bulging of the L4-5 disc with moderate-to-severe lumbar canal stenosis, central and leftward bulging of the L5-S1 disc and degenerative bone change.

On October 25, 2009 appellant filed a recurrence of disability claim commencing on September 13, 2004. He stated that the original injury left a weak spot in his back and that he has experienced pain off and on since the original injury. Appellant stopped work on August 10, 2007 and returned on October 15, 2007.

Appellant submitted various medical reports from Dr. Richard Berkman, a Board-certified neurological surgeon. In an October 25, 2005 medical report, Dr. Berkman and a registered nurse noted appellant's complaints of low back and left leg radicular pain. He reviewed appellant's medical history and noted the 1982 back surgery at L4-5 or L5-S1. Dr. Berkman observed that the September 16, 2005 MRI scan revealed a disc bulging, some scarring at appellant's left L4-5 and a partial broad-based disc rupture at the left L5-S1. The examination revealed appellant's motor strength was 5/5 throughout with no hip pain on internal and external rotation. His straight leg test was negative bilaterally.

In a February 15, 2007 medical report, Dr. Berkman examined appellant for left leg sciatica and recommended an epidural steroid injection. He administered two more injections before April 6, 2007.

In a July 3, 2007 medical report, Dr. Berkman reviewed appellant's myelogram which revealed spinal stenosis at L4-5. He discussed treatment options with appellant and recommended a facetectomy and foraminotomies at L4-5 on the left. In a July 24, 2007 medical report, Dr. Berkman examined appellant for complaints of left calf pain. Appellant stated that he wanted to proceed with surgery.

According to an August 13, 2007 operative report, Dr. Berkman conducted a resection of scar, foraminotomy, facetectomy at L4-5 and L5-S1 and a discectomy at L4-5. His preoperative diagnosis was lumbar degenerative disc disease with lateral recess stenosis.

Appellant submitted several postoperative medical reports dated August 14 and 28, September 11 and October 9, 2007 and May 7, 2008 from a physician's assistant and Dr. Berkman, who recorded that appellant was recovering fine and experienced occasional back pain but no leg pain. In an October 9, 2007 medical report, Dr. Berkman released appellant back to work, but advised him against any heavy lifting.

In a June 22, 2007 lumbar myelogram report, Dr. Michael C. Cian, a Board-certified diagnostic radiologist, observed moderate-to-severe L4-S1 spondylosis with evidence of mild-to-moderate central canal, lateral recess stenosis and nerve root impingement bilaterally at L4-5. He diagnosed L4-5 moderate-to-severe spondylosis with evidence of mild-to-moderate central canal, lateral recess stenosis and nerve root impingement bilaterally.

In a letter dated January 8, 2010, OWCP advised appellant that the evidence submitted was insufficient to support his recurrence of disability claim and requested additional information. It asked him to explain why he believed his current disability was related to the original work injury, to describe his work activities since returning to work on October 15, 2007 and to report any hobbies, sports activities, other employment or injuries. OWCP also requested copies of any treatment records for appellant's back since May 7, 2008 and a medical report which included a history of the original injury, findings and test results, a firm diagnosis and a physician's opinion, with medical reasons, explaining how his inability to work was related to the accepted work-related condition.

In a signed, undated personal statement, appellant responded that he believed his current disability was related to the original injury because he has continued to experience lower back and left leg pain since the injury and 1982 surgery. He also pointed out that his 2007 back surgery was to repair the bulging discs and spaces where the original injury and previous back surgery had occurred. Upon returning to work on October 15, 2007, appellant's work activities were okay. He was able to walk and stand without being in pain, but he did not go to work on August 13, 2007 because he had surgery.

Appellant resubmitted Dr. Berkman's medical reports dated October 25, 2005 to May 7, 2008. He also submitted medical reports dated February 25 and April 16, 2009 from Dr. H. Clifton Simmons III, a dental surgeon, regarding treatments for a temporomandibular joint disorder.

In handwritten progress notes dated February 20 to September 23, 2009, Dr. Robert Hudson, a family practitioner, recorded his treatments for appellant's back pain. In an October 30, 2009 report, he stated that he saw appellant in his office for complaints of recurrent tingling in his left calf, particularly at night. Upon examination, Dr. Hudson did not observe any neurological deficits and opined that appellant had little irritation of the nerve root.

By decision dated March 8, 2010, OWCP denied appellant's recurrence of disability claim on the grounds of insufficient medical evidence establishing that his current disability and

medical treatment was related to the original injury and accepted condition. It found that, although the medical records mentioned his previous November 3, 1982 surgery, none of the reports contained a physician's opinion explaining how or why his 2007 back surgery and back condition was related to the October 27, 1982 work-related injury.

On April 8, 2010 appellant submitted a request for an oral hearing to the Branch of Hearings and Reviews. He resubmitted the June 22, 2007 myelogram and radiology reports, the August 13, 2007 operative report and Dr. Berkman's April 6, 2007 to October 30, 2009 medical reports.

By decision dated June 7, 2010, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. It found that his request was not made within 30 days and thus, he was not entitled to a hearing as a matter of right. OWCP also exercised its discretion and determined that appellant's case could equally well be addressed by requesting reconsideration from the district Office.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.²

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence of disability is causally related to the original injury.³ This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.⁴

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁵ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.⁶ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical

² 20 C.F.R. § 10.5(x).

³ *Id.* at § 10.104(b); *Carmen Gould*, 50 ECAB 504 (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (March 2011).

⁵ *D.I.*, 59 ECAB 158 (2007); *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009).

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁷ The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a precipitation of acute herniation of L4 with compression of L5 nerve root as a result of an October 27, 1982 work injury. On October 16, 2009 appellant filed a recurrence of disability claim commencing on September 13, 2004 alleging that he continued to suffer from back pain after the original injury. He stopped work on August 10, 2007 and returned on October 15, 2007. The issue is whether appellant sustained a recurrence of disability on September 13, 2004 causally related to the October 27, 1982 work injury. The Board finds that he failed to submit probative medical evidence from a physician establishing how his disability on or after September 13, 2004 resulted from his accepted employment injury.

Appellant submitted medical reports from Dr. Berkman dated October 25, 2005 to May 7, 2008 regarding medical treatment for his back pain. In an October 25, 2005 medical report, Dr. Berkman noted that appellant underwent back surgery in 1982. According to an August 13, 2007 operative report, he performed a left L4 hemilaminectomy and discectomy and diagnosed degenerative joint disease. Dr. Berkman does not, however, describe the October 27, 1982 work injury nor explain how appellant's current condition resulted from the accepted work injury or back condition. None of these reports contain rationalized medical opinion evidence demonstrating that appellant sustained a recurrence of disability on September 13, 2004 causally related to the original injury.⁹ As Dr. Berkman's reports do not contain any explanation relating appellant's October 27, 1982 work injury to his current back condition, they are of limited probative value to establish appellant's claim.¹⁰

During his oral argument, appellant contended that the fact that his 2007 back surgery was in the same location as his 1982 back surgery was indicative of causal relationship. OWCP procedure manual states, however, that in recurrence claims it is not assumed that any subsequent incapacity involving the injured part of the body is the result of the original injury solely because the original injury was accepted.¹¹ Thus, the fact that appellant's 2007 back surgery repaired the same area of his back as the 1982 surgery is alone insufficient to establish

⁷ *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

⁸ *Patricia J. Bolleter*, 40 ECAB 373 (1988).

⁹ *See H.M.*, Docket No. 09-864 (issued November 6, 2009).

¹⁰ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹¹ *Supra* note 4, *Recurrences*, Chapter 2.1500(7)(b)(1) (April 2011).

that his current disability is causally related to the October 27, 1982 work-related injury without the submission of rationalized medical opinion evidence supporting causal relationship.

Appellant also provided diagnostic results from Drs. Limbaugh, Percelay, Starnes and Cian, which diagnosed degenerative disc disease L4-5 and L5-S1, broad-based bulging of the L4-5 disc with moderate to severe lumbar canal stenosis, central and leftward bulging of the L5-S1 disc, L4-5 moderate-to-severe spondylosis and nerve root impingement bilaterally. None of the reports, however, contained any opinion regarding the cause of his back condition or relating his condition to the accepted October 27, 1982 work injury. Similarly, Dr. Hudson's February 20 to September 23, 2009 reports also do not contain any opinion regarding the cause of appellant's back condition. As these reports do not provide any rationalized medical opinion on the cause of appellant's back condition, these reports also fail to establish his burden of proof.¹²

Appellant also submitted medical reports from Dr. Simmons, a dental surgeon. None of the reports, however, mention any treatments for his back condition and, therefore, are likewise insufficient to establish his claim.

On appeal, appellant alleges that he thinks his current back condition is related to the original October 27, 1982 injury because his lower back and left leg have never been the same since the original injury. The employee's lay opinion, however, is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹³ As previously stated, causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence from a physician.¹⁴ Appellant has not provided such probative medical evidence in this case and thus, OWCP properly denied his claim for a recurrence of disability.

Appellant may submit new evidence or argument with a timely written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.¹⁵ According to 20 C.F.R. § 10.615, a claimant shall be afforded a choice of an oral hearing or review of the written record.¹⁶ The regulations provide that a request for a hearing or review of

¹² *A.D.*, 58 ECAB 149 (2006); *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

¹³ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁴ *Woodhams*, *supra* note 6.

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. § 10.615.

the written record must be made within 30 days, as determined by the postmark or other carrier's date making, of the date of the decision.¹⁷ A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of OWCP's decision.¹⁸ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period. If it denies claimant's request, it must provide claimant with reasons.¹⁹

ANALYSIS -- ISSUE 2

OWCP issued its decision denying appellant's claim for recurrence on March 8, 2010. Appellant's request for an oral hearing was postmarked April 8, 2010. Since this date is more than 30 days after the March 8, 2010 merit decision, he is not entitled to an oral hearing as a matter of right. Because appellant's request was not made within 30 days, OWCP exercised its discretionary authority in denying his request and advised him that the issue could be equally addressed by requesting reconsideration and submitting new evidence. The Board finds that there is no evidence of an abuse of discretion in this case.²⁰ As appellant's request for an oral hearing was untimely, OWCP properly exercise its discretion in denying his request.

On appeal, appellant acknowledges that he did not submit his request for an oral hearing before the 30-day deadline and explains that, because he is frequently out of town for work 20 to 25 days at a time, his mail gets backed up. The Board has found, however, that the 30-day time limitation of requesting an oral hearing is unequivocal.²¹ As appellant has not shown that OWCP abused its discretion in this case, the Board affirms the denial of his request for an oral hearing as untimely.

CONCLUSION

The Board finds that appellant did not establish that he sustained a recurrence on September 13, 2004 causally related to his accepted back condition. The Board also finds that OWCP properly denied his request for an oral hearing as untimely.²²

¹⁷ *Id.* at § 10.616(a).

¹⁸ *See James Smith*, 53 ECAB 188 (2001).

¹⁹ *See Cora L. Falcon*, 43 ECAB 915 (1992); *see also G.W.*, Docket No. 10-782 (issued April 23, 2010).

²⁰ *See Gerard F. Workinger*, 56 ECAB 259 (2005); *P.M.*, Docket No. 10-1440 (issued February 8, 2011).

²¹ *Philip G. Feland*, 48 ECAB 485 (1997); *Clyde Bovender*, 32 ECAB 1883 (1981).

²² The Board notes that appellant submitted additional evidence following the June 7, 2010 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 7 and March 8, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board